

PROTESTS



Guiding Principles

- Resolving solicitation issues before a protest is lodged may avoid a protest and associated costs and delays in contract award.
- When a protest is lodged, prompt action by the Contracting Officer will help to assure efficient and timely resolution of the protest.

[Reference: FAR 33.1, DEAR 933.1, GAO Regulations at 4 CFR 21]

Overview

This chapter discusses the processing of documents in response to a protest against award lodged with the contracting activity, the Procurement Executive, the General Accounting Office, or the Federal courts.

Background

While the FAR, DEAR and GAO regulations referenced above provide detailed direction for the handling of protests, this Guide section presents additional information which may be helpful to those personnel who are involved with the protest process.

Protests are a structured means by which offerors challenge some aspect of the Department's handling of a procurement. Protests can also provide the Department with an opportunity to remedy significant errors in a procurement.

Levels of Protests

In order to maximize the opportunity to remedy any procurement errors, to reduce costs and delays in procurements, and to enhance the ability of the Department to meet the needs of its customers, protests are handled at the least formal level possible.

Currently, protests can be filed at three levels: to the agency (which includes both protests to the Head of the Contracting Activity and to the Procurement Executive); to the General Accounting Office (GAO); and, to federal courts (including the United States Court of Federal Claims and United States District Courts).

If an offeror contacts the Contracting Officer or the Contract Specialist prior to filing a protest, the Contracting Officer or specialist should attempt to address the offeror's concerns in order to avoid the filing of a protest, and should encourage the potential protester to pursue any protest within the agency before filing a protest with GAO or a suit with the appropriate Federal court. The Contracting Officer coordinates the handling of any protest with their appropriate Counsel office.

Processing Protests

Upon receiving notice of a protest, the Contracting Officer withholds award or suspends contract performance in accordance with the provisions at FAR 33.103(f), 33.104(b), (c), and (d), and DEAR 933.103(f), 933.104(b) and (c).

I. Protests to the Department of Energy Contracting Activity or Procurement Executive

Protests to DOE will be decided either by the Head of the Contracting Activity or the Procurement Executive. Unless the protester requests that the protest be decided by the Procurement Executive, or the circumstances at DEAR 933.103 (i)(1)(i), (ii), or (iii) exist, protests to DOE will be decided by the Head of Contracting Activity (HCA).

The Procurement Executive or the HCA (whichever is the deciding authority) will issue a decision on the protest within 35 calendar days, unless a longer period of time is determined to be needed.

Protest decisions must be in writing. Even if the decision is to dismiss the protest on a procedural ground (such as lack of timeliness, lack of interested party status, etc.), the protest decision should note the allegations of the protest. Protest decisions should be sent by fax to the protester (if the protester has designated representation, the decision should be sent to the representative), or if the protester does not have a fax, the decision should be sent by certified mail with a return receipt or other means that provides evidence of receipt.

The contract file should include the protest decision and evidence of the protester's receipt of the protest decision (e.g., fax confirmation printout or handwritten notation of oral confirmation of fax receipt).

Protests to Be Resolved by the Contracting Activity

The Contracting Officer makes every attempt to resolve the protest through direct negotiations with the offeror with due regard to the need for amending the solicitation. The Contracting Officer prepares a report including the elements at FAR 33.104(a)(3)(iii) and assembles the information necessary to enable review of the protest and the issuance of a decision by the HCA. The Contracting Officer provides a copy of the protest and the protest decision of the HCA to the Office of Contract Management.

Protests to Be Resolved by the Procurement Executive

The Office of Contract Management is notified immediately and provided a copy of any protest that is to be decided by the Procurement Executive.

The Contracting Officer prepares a report similar to that discussed in FAR 33.104(a)(3)(iii). The report is forwarded to the Office of Contract Management within 21 calendar days of receipt of a

protest. The Contract Specialist consults with the Office of Contract Management concerning the number of copies needed and any other information required.

The Office of Contract Management will explore with the protester whether the use of alternative dispute resolution techniques may assist in the resolution of the protest decision.

II. Protests to the General Accounting Office (GAO)

Not later than one (1) day after a protest is filed with the GAO, the protester provides a copy of its complete protest to the contact person stated in the solicitation or to the Contracting Officer. Within one (1) day of receipt of a protest, the Contracting Officer must give notice of the protest to the contractor, if award has been made, or, if no award has been made, to all offerors who appear to have a substantial and reasonable prospect of receiving award if the protest is denied. The protest submissions are provided to all such parties unless one or more of the parties has identified sensitive information and requests a protective order. In that event, the Contracting Officer obtains a redacted version from that party(ies) for appropriate dissemination. The Contracting Officer works with the assigned protest attorney from the cognizant Counsel office in reviewing the merits of the protest, and preparing the agency report.

The GAO typically schedules a status conference among the parties to discuss the protest within a week after the protest is filed, so it is important to coordinate with the protest attorney quickly. In many protests, DOE will produce documents to the protester's counsel within ten days after the protest is filed, and may also be required to submit a list of all relevant documents to the GAO and the protester within 25 days after the protest is filed.

A complete report is submitted to the GAO within 30 days from the date of receipt of the telephonic notice of the protest from GAO (or within 20 days after receipt of notification of a determination to use the express option). The report to GAO includes the elements addressed at FAR 33.104(a)(3)(iii).

GAO makes every effort to issue a decision on the protest within 100 calendar days after the initial protest is filed, even if the protester has filed a supplemental protest after the initial protest.

III. Protests in Federal Courts

When a suit protesting the award of a DOE contract is filed with the appropriate Federal court, the Department will be represented by the United States Attorney having jurisdiction in the court where the protest suit was filed.

The cognizant Counsel office acts as liaison for the Department. The Contracting Officer provides all necessary support as promptly as possible as requests are made during the pendency of the litigation.